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4 ALVIN DALTON,

5 Plaintiff,

6 v.

7 M. VOTARI,

8 Defendant.

9 Case No. 23-cv-01598-JSW

10  
11 **ORDER OF DISMISSAL WITH LEAVE  
TO AMEND**

12 **INTRODUCTION**

13 Plaintiff, a California parolee proceeding pro se, filed a civil rights complaint under 42  
14 U.S.C. § 1983. He is granted leave to proceed in forma pauperis in a separate order. For the  
15 reasons discussed below, the complaint is DISMISSED with leave to amend.

16 **ANALYSIS**

17 **A. STANDARD OF REVIEW**

18 Federal courts must engage in a preliminary screening of cases in which prisoners seek  
19 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
20 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims  
21 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek  
22 monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se  
23 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th  
24 Cir. 1990).

25 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the  
26 claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the  
27 statement need only ""give the defendant fair notice of what the . . . claim is and the grounds upon  
28 which it rests.""" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations omitted). Although

1 in order to state a claim a complaint "does not need detailed factual allegations, . . . a plaintiff's  
2 obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than labels and  
3 conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . .  
4 Factual allegations must be enough to raise a right to relief above the speculative level." *Bell*  
5 *Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A complaint  
6 must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974.

7 **B. LEGAL CLAIMS**

8 Plaintiff alleges that he suffers from a bronchial condition and his cellmate smokes five  
9 cigarettes a day. Smoking, according to Plaintiff, is against prison rules, but unnamed correctional  
10 officials do not enforce these rules. As a result, Plaintiff is exposed to his cellmate's smoke,  
11 which is detrimental to his health. He requested (presumably in an administrative grievance) to be  
12 granted single-cell status, but Defendant, who works in the "Health Care Correspondence and  
13 Appeals Branch" of California Correctional Health Care Services, denied his request. He claims  
14 for a single cell. He alleges that his exposure to secondhand smoke with his bronchial condition  
15 constitutes cruel and unusual punishment.

16 The failure of prison officials to protect inmates from attacks from dangerous conditions at  
17 the prison violates the Eighth Amendment when two requirements are met: (1) the deprivation  
18 alleged is, objectively, sufficiently serious; and (2) the prison official is, subjectively, deliberately  
19 indifferent to inmate health or safety. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). A prison  
20 official is deliberately indifferent if he knows of and disregards an excessive risk to inmate health  
21 or safety by failing to take reasonable steps to abate it. *Id.* at 837. Liability may be imposed on an  
22 individual defendant under 42 U.S.C. § 1983 if the plaintiff can show that the defendant's actions  
23 both actually and proximately caused the deprivation of a federally protected right. *Lemire v. Cal.*  
24 *Dept. of Corrections & Rehabilitation*, 726 F.3d 1062, 1085 (9th Cir. 2013).

25 To whatever extent Plaintiff's alleged exposure to secondhand smoke constitutes a  
26 sufficiently unsafe condition to qualify as a serious deprivation within the meaning of the Eighth  
27 Amendment, his allegations make clear that Defendant's denying him single-cell status did not  
28 constitute deliberate indifference to his safety or proximately cause him to be exposed to

1 secondhand smoke. Plaintiff's allegations make clear that prison rules prohibit smoking, and the  
2 only reason that his cellmate smokes is that correctional officers (whom he does not sue) do not  
3 enforce those rules. Defendant works in the healthcare services division of the prison system and  
4 as such does not plausibly have any say in enforcing prison rules against smoking, disciplining  
5 inmates who smoke, or ensuring that the prison facilities where Plaintiff resides remain smoke-  
6 free. Plaintiff's medical condition plausibly warrants a smoke-free environment, but not  
7 necessarily a single cell. He could safely have a cellmate who does not smoke, or, better yet,  
8 officials could enforce the nonsmoking rules. There are no allegations that plausibly indicate  
9 either of these two remedies were not possible, let alone that Defendant knew, when denying the  
10 request for a single cell, that correctional officials would not enforce the rules against smoking or  
11 that Plaintiff could not be assigned a cellmate who does not smoke. Plaintiff's quarrel, in other  
12 words, is with the officials who do not enforce the non-smoking rules, not with Defendant. As  
13 Plaintiff's allegations indicate that Defendant was not deliberately indifferent to his safety and did  
14 not proximately cause him to suffer in unsafe conditions, the claims against him will be dismissed.

15 Plaintiff is granted leave to amend his complaint to sue those who were deliberately  
16 indifferent to his need to avoid secondhand smoke and who proximately caused him to remain  
17 exposed to it.

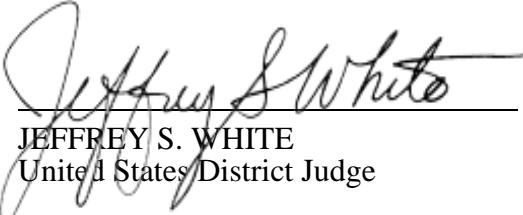
## 18 CONCLUSION

- 19 1. The complaint is DISMISSED with leave to amend.
- 20 2. Plaintiff shall file an amended complaint within **twenty-eight (28) days from the**  
**date this order is filed.** The amended complaint **must** include the caption and civil case number  
21 used in this order (No. C 23-1538 JSW (PR)) and the words "COURT-ORDERED FIRST  
22 AMENDED COMPLAINT" on the first page. Because an amended complaint completely  
23 replaces the original complaint, *see Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992),  
24 Plaintiff may not incorporate material from the original by reference; he must include in his  
25 amended complaint all the claims he wishes to pursue. Failure to amend within the designated  
26 time and in accordance with this order will result in the dismissal of this case.
- 27 2. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court

1 informed of any change of address by filing a separate paper with the clerk headed "Notice of  
2 Change of Address." He also must comply with the Court's orders in a timely fashion, although he  
3 may request an extension of time provided it is accompanied by a showing of good cause and it is  
4 filed on or before the deadline he wants to extend. Failure to do so may result in the dismissal of  
5 this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

6 **IT IS SO ORDERED.**

7 Dated: August 18, 2023

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11 JEFFREY S. WHITE  
12 United States District Judge  
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